Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF VERMONT,

Petitioner

v.

RICK COX,

Respondent

On Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

Was the Vermont Supreme Court correct in holding that the Fifth Amendment was violated when a probation officer solicited incriminating information from respondent, who was incarcerated, after the probation officer had refused respondent's request to defer the interview until he had sought advice from an agent of respondent's counsel? Should the decision of the Vermont Supreme Court be affirmed on other grounds: (1) Did the probation officer's solicitation of information from respondent in the circumstances of this case violate respondent's Sixth Amendment right to counsel? (2) Were respondent's incriminating statements to the probation officer inadmissible against him at sentencing because respondent was not given *Miranda* warnings before the probation officer questioned him?

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SUMMARY OF ARGUMENT

Because the state had no legitimate, or such an insubstantial, interest in conducting a presentence investigation (PSI) interview with respondent before honoring his request for legal advice about the interview, and because the probation officer incorrectly told respondent that he must speak to her without consultation with counsel or forfeit completely his opportunity to make a statement for inclusion in the PSI report, his incriminating statements to the probation officer were compelled and involuntary, and thus inadmissible, under the Fifth Amendment. The decision of the Vermont Supreme Court is also correct because the probation officer's insistence that respondent proceed with the interview, if at all, without legal advice, which respondent requested, violated the right to assistance of counsel secured by the Sixth Amendment. Finally, the failure of the probation officer to give respondent *Miranda* warnings before the PSI interview justifies the Vermont Supreme Court's decision excluding respondent's incriminating statements from the PSI report and from use in sentencing respondent.

ARGUMENT

I. The Probation Officer's Insistence That Respondent Participate In The PSI Interview Without Advice Of Counsel, Or Not At All, Compelled Respondent's Incrimination In Violation Of The Fifth Amendment.

This case involves a convicted but unsentenced defendant who told a probation officer that he wanted the chance to confer with a representative of his attorney's office before participation in a presentence investigation (PSI) interview. The probation officer offered respondent, the defendant, the choice between forfeiting his opportunity to include a statement in the PSI report if he chose to await the arrival of the defense investigator and speaking

to her at once without counsel's advice. Because the choice put to respondent made the exercise of the privilege costly—if he claimed the privilege, he lost the chance to speak for the PSI report—, respondent's statements included in the PSI report were compelled and thus inadmissible at sentencing.

In a series of cases, this Court has prohibited states from burdening the exercise of Fifth Amendment rights by imposing a penalty upon persons who claim the privilege. In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the Court held that persons threatened with discharge from employment for claiming the Fifth Amendment privilege did not act freely when they answered official questions:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. . . . We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. 385 U.S. at 497-498 (footnote omitted).

Likewise, in *Gardner* v. *Broderick*, 392 U.S. 273 (1968), the Court invalidated the discharge of a policeman for refusing to waive his Fifth Amendment privilege. A similar result was reached in *Sanitation Men* v. *Sanitation Comm'r*, 392 U.S. 280 (1968). Later, the Court held that requiring public contractors to waive the protections of the Fifth Amendment or to lose their current contracts and be barred from future transactions violated the privilege against self-incrimination. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). The *Turley* Court, quoting *McCarthy* v. *Arndstein*, 266 U.S. 34, 40 (1924), held that

> [t]he privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is

> sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant. 414 U.S. at 77.

The *Turley* Court noted that ". . . claims of overriding interests are not unusual in Fifth Amendment litigation and they have not fared well." *Id.*, at 78. The Court applied the same rule to officers of political parties in *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

Within the trial process itself, the Court has been unwilling to permit significant burdens on the exercise of the privilege against self-incrimination. In *Griffin* v. *California*, 380 U.S. 609 (1965), the Court held that the Fifth Amendment prohibited comment by a prosecutor on a defendant's silence at trial and jury instructions that such silence is evidence of guilt. Permitting such comment, the Court held, ". . . is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614.

In *Brooks* v. *Tennessee*, 406 U.S. 605, 609 (1972), the Court held that the requirement that a defendant testify first in the defense case or not at all was ". . . an impermissible restriction on the defendant's right against self-incrimination, 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence,'" quoting *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964).

In this case, respondent was confronted by an agent of the state who sought to question him. Respondent expressed the need to confer with counsel about participation in the PSI interview—a decision which involved whether to waive or claim the privilege against self-

incrimination.[1] Since the probation officer threatened to impose the penalty of forfeiture of the opportunity to make a statement for the PSI upon respondent if he decided to seek legal advice about whether to speak or remain silent, his disclosure of damaging material to her, as in *Garrity*, was not voluntary and thus could not be used in sentencing him.

The state argues that all respondent was required to do was choose between silence and participation when confronted by the probation officer's request for an interview: "[b]eing asked to make a choice is not violative of the privilege against self-incrimination." BP at 8. Similarly, the Solicitor General, citing *McGautha* v. *California*, 402 U.S. 183 (1971), maintains that ". . . the privilege does not protect an individual from being faced with hard choices as to whether to exercise the privilege." BUS at 7. While it may be true that it is not unconstitutional to require a choice, it requires a great leap beyond the principles of *McGautha* to maintain that the state can require a defendant represented by counsel to make this hard choice without counsel's assistance solely to satisfy a probation officer's convenience.[2] The "hard choices" required by

[1] The state and the Solicitor General concede that the Fifth Amendment is available to a convicted but unsentenced defendant. See Brief of the Petitioner (hereafter "BP") at 13-14; Brief of the United States (hereafter "BUS") at 6 n. 2. See also *Estelle* v. *Smith*, 451 U.S. 454, 462-463 (1981); *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984).

[2] There is no suggestion in the record that respondent's request for counsel was dilatory or in bad faith. Despite the supposition made by the Solicitor General (BUS at 4-6) that the attorney's agent was late to a prearranged meeting, it is equally as likely that the probation officer just showed up unannounced at the correctional center where respondent was jailed. See J.A. 15. Further, any inference that it was necessary or legitimate for the probation officer to insist that the interview be then or never is belied by the record and the opinion of the Vermont Supreme Court in this case. See *State* v. *Cox*, 519 A.2d 1144, 1146-1147 (Vt. 1986).

McGautha are assumed to be made upon reflection and consultation with counsel; these are "choices with which criminal defendants *and their attorneys* are quite routinely faced." *McGautha, supra*, at 215. (emphasis supplied).

For this Court to find that external pressure on a defendant to speak is not unconstitutional compulsion, the forces contending against silence must at least serve some valid state purpose. See *Williams* v. *Florida*, 399 U.S. 78, 83-86 (1970); *United States* v. *Byers*, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (opinion of Scalia, J.); *McGautha, supra*, at 214-217. Even then, the Fifth Amendment privilege often will override a clearly valid and substantial state interest. For example, in *Brooks* v. *Tennessee, supra*, the legitimate state interest in preventing the defendant from coloring his testimony in response to prior defense witnesses was not found sufficient to uphold Tennessee's requirement that the defendant testify first in the defense case or not at all. Such a requirement, the Court held, denied an accused the free choice to decide if and when to forgo his Fifth Amendment privilege. 406 U.S. at 609-612. The "now or never" choice put to respondent in this case was justified by an interest much less substantial than the state's interest in *Brooks*.

According to the state and the Solicitor General, no "compulsion" within the meaning of the Fifth Amendment occurred by requiring respondent to speak at the PSI interview before receiving counsel's advice or to lose the chance to make a statement for inclusion in the PSI; it is argued that respondent would have lost nothing of value by remaining silent at the interview since he had the right to speak at the sentencing hearing itself. This claim inaccurately devalues the importance of a defendant's decision whether to offer or decline a statement for inclusion in the

PSI report and erroneously equates the right of allocution with the defendant's statement in a PSI report.

While respondent would not denigrate the importance of the right of allocution, it is not accurate to equate this one shot chance with the influence the PSI report has on a defendant's sentence, prison classification and program, and chance for parole. "It is impossible to overemphasize the importance of the PSI report. The PSI report is 'a critical document' and is the primary source of information about a criminal defendant's background 'for all stages of the correctional process' including, of course, sentencing." Carroll, "The Defense Lawyer's Role in the Sentencing Process: You've Got to Accentuate the Positive and Eliminate the Negative," 37 Mercer L. Rev. 981, 988 (1986). [footnotes omitted] The state and the Solicitor General both note the critical importance at sentencing of the defendant's PSI statement. See BP at 15-16; BUS at 18 n. 11. It is curious that they then denigrate the importance of the choice faced by respondent when confronted by the probation officer.

Leading authorities counsel defense lawyers to assist their clients during presentence investigations. The ABA Standards for Criminal Justice comment:

> The presentence investigation is little understood by most defendants. As a result, some defendants will act contrary to their own interests by being uncooperative and closemouthed. Those even more ignorant of the investigation's purposes may brag of crimes and criminal associations more fanciful than real.
>
> * * *
>
> Counsel's functions vis-a-vis the probation officer are perhaps even more important. Although it is not recommended that counsel turn the presentence

interview between the probation officer and the defendant into an adversarial exchange, there are a number of useful functions counsel can perform at this juncture: information can be marshaled, extenuating circumstances detailed, and the defendant's views better articulated. In cases where counsel and the probation officer share "a similar social milieu," it has been observed that the presence of counsel can establish a better rapport and thus increase the flow of information. An experienced practitioner has indeed argued that counsel's presence at these interviews should be mandatory:

> Counsel *must* arrange to be present with his client at the time of the presentence (or prepleading) investigation interview. Eight or ten years ago, such presence was virtually unknown. The social workers who conduct the presentence interview (ordinarily, probation department personnel) and prepare the report for the court resented the intrusion of counsel, stating that this interfered with the "one-to-one relationship" with the defendant. Happily, the constitutional right to counsel at every stage of the proceedings has overridden this objection, and, in many jurisdictions, the interviews are open to the presence of counsel. Sadly, however, most counsel still do not attend their clients' presentence interviews.

> The role of counsel at the presentence interview can be critical. Unfortunately, most defendants are not very bright. If they were, they would not be making their living in the fashion that led to the criminal charges, or they would not have been caught. Most are not articulate. Many are members of ethnic minorities, frequently lacking in communicative skills and more frequently with problems of comprehending anything terribly complicated. To send such defendants in, without counsel at their side, for interviews that will figure

> critically in the presentence investigator's report, is itself almost criminal.
>
> These standards recommend but do not require the attorney's presence; however, they believe counsel should always prepare the client for the interview. Counsel's participation in the interview should be modest, aimed more at clarification and supplementation than at oral advocacy. Counsel should also understand the logistical difficulties under which most probation officers labor and should seek to accommodate his or her schedule to theirs. The issue of the privileged character of statements made at the probation officer interview is not addressed by these standards, but it is recognized that defense counsel should apprise the client of the applicable law in this regard.

III ABA Standards for Criminal Justice, "Sentencing Alternatives and Procedures," Commentary to Standard 18-6.3, pages 18.442-444 (2d Ed. 1980) (footnotes omitted).

To be contrasted are the Standards' comments on the right of allocution:

> By the time the judge comes to the bench, the judge is usually in a sentencing mood. He has studied the case, including the presentence report, and has done the best he can. He may have several men to sentence and other cases and motions awaiting hearing as well. He is about to announce the sentence. The allocution sometimes changes the contemplated sentence, but not usually.
>
> *Id.*, Commentary to Standard 18-5.5, at 18.383 (footnote omitted).

It is thus disingenuous to suggest that a defendant's comments immediately before sentence is announced have the

same influence on the sentence as a defendant's statement in the PSI report.

Substantial pressure was exerted on respondent to participate in the interview. He was incarcerated, and the probation officer sought to interview him in accordance with the trial court's order to prepare a PSI report. See 28 Vermont Statutes Annotated § 204; J.A. 1. The situation confronting grand jury witnesses is very different from the circumstances facing respondent. In *United States* v. *Mandujano*, 425 U.S. 564 (1976) (plurality opinion), the Court held that false statements made by a grand jury witness when called to testify about criminal activites in which he may have been involved could be admitted in the witness's perjury prosecution even if the witness had not received *Miranda* warnings. However, in *Mandujano*, unlike this case, the witness was advised before he testified that he was not required to incriminate himself, that he must answer nonincriminating questions, and that false answers could result in a perjury prosecution. Mandujano was also told that he could leave the grand jury room to confer with counsel. Respondent was denied this opportunity.

In *United States* v. *Washington*, 431 U.S. 181 (1977), the defendant was called before a grand jury and given "comprehensive warnings" about assistance of counsel and the right to remain silent. 431 U.S. at 186. The Court found that these warnings eliminated any compulsion that may have arisen from the grand jury setting. Likewise, in *Garner* v. *United States*, 424 U.S. 648 (1976),[3] where the Court held that the duty to file an income tax return was

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[3] *Garner* also rejects the state's claim (SB at 16-17) that one may safely wait until a criminal prosecution ensues to assert the Fifth Amendment privilege. See 424 U.S. at 653-656.

not itself unconstitutional compulsion to incriminate oneself, it is significant that the taxpayer could have prepared the return with advice of counsel and could have asserted the privilege with regard to particular matters requested in the return. The Court noted:

> In fact, a taxpayer, who can complete his return at leisure and with legal assistance, is even less subject to the psychological pressures at issue in *Miranda* than a witness who has been called to testify in judicial proceedings. 424 U.S. at 658.

In the foregoing cases, the person questioned was not incarcerated and was not required to make an immediate and irrevocable decision, without counsel, to claim or forgo the privilege. In contrast, the probation officer's "now or never" choice to respondent, and respondent's incarceration, compelled him to participate in the interview.

Of this Court's decisions, *Minnesota* v. *Murphy*, 465 U.S. 420 (1984) is perhaps the closest to this case. In *Murphy*, the Court held that an unincarcerated probationer under a general duty to answer truthfully his probation officer's questions could and must claim his Fifth Amendment privilege in response to incriminating queries. Failure to claim the privilege when the questions were asked amounted to a forfeiture of the privilege. In deciding that the circumstances of Murphy's questioning were not coercive, the Court noted that Murphy was free to terminate the interview at any time without adverse consequences, was not incarcerated, and did not ask for assistance of counsel at the interview.[4]

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[4] This Court accepted the lower court's conclusion that Murphy's reference to getting a lawyer was not in connection with the probation officer's questioning but rather in connection with a possible suit for breach of the confidentiality of Murphy's drug therapy program. 465 U.S. at 424 n. 3.

In contrast, respondent in this case was incarcerated. There is no certainty from the record that the interview was mutually prearranged. Finally, and most important, respondent expressly sought legal advice about whether to claim or waive his Fifth Amendment privilege;[5] in response, the probation officer told him that exercise of this option would amount to forfeiture of his right to include a statement in the PSI report. Under these circumstances, respondent's statements to the probation officer were not voluntary. To suggest, with the Solicitor General (BUS at 10-13), that an incarcerated defendant be required to decide on his own which questions are incriminating and which may be safely or wisely answered proposes a rule that might work for incarcerated defendants who also happen to be lawyers; for the average inmate, such a rule is completely impractical.

The state and the Solicitor General suggest that a PSI interview is a benign procedure designed to help the defendant. See BP at 23-24; BUS at 18 and n. 11. Such a view ignores the teachings of this Court that a probation officer, whatever his or her relationship with the probationer, has no duty to preserve the probationer's confidences; "[a] probationer cannot pretend ignorance of the fact that his probation officer 'is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers.'" *Minnesota* v. *Murphy*, *supra*, at 432, quoting *Fare* v. *Michael C.*, 442 U.S. 707, 720 (1979). In her role as gatherer of information for the PSI report, the probation officer's function is even closer to that of an

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[5] A request for counsel during questioning is normally viewed as an assertion of the right to remain silent. See *Miranda* v. *Arizona*, 384 U.S. 436, 444-445, 473-474 (1966); *Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979). In this case, respondent also asserted directly his right to remain silent until he could confer with the defense investigator.

interrogating police officer than when, as in *Murphy*, she supervises a defendant on probation.

For all the foregoing reasons, the Vermont Supreme Court's decision should be affirmed.

II. Respondent Possessed And Asserted His Sixth Amendment Right To Advice Of Counsel Before The PSI Interview; The Record Does Not Establish That Respondent Waived His Sixth Amendment Right To Counsel

Immediately before the PSI interview, respondent asked to consult with counsel. Respondent's Sixth Amendment right to counsel had attached upon commencement of the prosecution, see *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). This Sixth Amendment right still attended him since he had not yet been sentenced. See *Mempa* v. *Rhay*, 389 U.S. 128, 133-34 (1967).[6] After his request for a chance to confer with counsel[7] was not honored, respondent then spoke with the probation officer. Under these circumstances, no waiver of the Sixth Amendment right to counsel occurred.[8]

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[6] The right to counsel at sentencing was all the more important in this case since by his pleas respondent waived the right to contest guilt at trial.

[7] The Solicitor General concedes that respondent's request to speak with a defense investigator was a request for counsel. BUS at 4, n. 1. The state does not challenge this conclusion of the Vermont Supreme Court. There seems little doubt that respondent's request should be considered a request for counsel, since the investigator by training could perform many of counsel's advisory functions and could have confidential communications with respondent. See Vermont Rule of Evidence 502. Compare *Fare* v. *Michael C.*, *supra*, 442 U.S. at 719-724; *United States ex rel. Riley* v. *Franzen*, 653 F.2d 1153, 1158-1162 (7th Cir. 1981).

[8] Respondent relied, *inter alia*, on the Sixth Amendment right to counsel in his appeal to the Vermont Supreme Court, and its judgment may be affirmed on this ground. *Whitley* v. *Albers*, ____ U.S. ____, 106 S.Ct. 1078, 89 L.Ed.2d 251, 265 (1986).

In *Michigan* v. *Jackson*, ___ U.S. ___, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), the Court decided that the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), governing waivers of the Fifth Amendment right to counsel asserted during custodial interrogation, applied to waivers of the Sixth Amendment right to counsel asserted at arraignment on criminal charges. The Court reaffirmed the principle that the Sixth Amendment right to counsel is broader than the right to counsel discussed in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which applies only to custodial interrogations. The *Jackson* court noted that it would make no sense to give Sixth Amendment counsel rights less protection than the *Miranda* right to counsel: "In our opinion, . . . the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before." 89 L.Ed.2d at 639.[9]

In this case, the record shows that respondent spoke to the probation officer only after he asked for time to consult with counsel and that request was not honored. Nothing in the record indicates that respondent voluntarily initiated further conversations with the probation officer after he requested counsel. Under these circumstances, the respondent's contested statements in the PSI report were obtained in violation of his Sixth Amendment right to counsel.

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[9] The facts of this case are similar to *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). In *Escobedo*, police obtained incriminating statements from the defendant after he had requested and been refused the opportunity to talk with his lawyer. While the holding of *Escobedo* is doubtful under current doctrine governing the attachment of the right to counsel, the circumstances of that case would no doubt constitute a Sixth Amendment violation if, as here, the defendant had been formally charged.

Baumann v. *United States*, 692 F.2d 565 (9th Cir. 1982) is slim authority on the question of the applicability of the Sixth Amendment right to counsel at a PSI interview. The *Baumann* court found that denial of an attorney's advice before a PSI interview is "constitutionally insignificant." *Id.*, at 578. This conclusion derives from labeling the interview "routine," (and thus, presumably unimportant) and adverting to the wide discretion of the sentencing judge to fashion a sentence. *Id.* This view of the importance of the PSI report and what a defendant says for inclusion in it is at odds with the authorities cited in Part I, *supra*, and this Court's "critical stage" cases.

In *United States* v. *Wade*, 388 U.S. 218 (1967), the Court identified certain characteristics of pretrial lineups which made assistance of counsel at those proceedings "critical." Each stage of a criminal proceeding must be examined, the *Wade* court wrote, ". . . to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." 388 U.S. at 227. Counsel may not be required if ". . . there is minimal risk that [a defendant's] counsel's absence might derogate from his right to a fair trial.[10] *Id.*, at 228.

Under *Wade*, it can scarcely be maintained that counsel is of little importance in shaping a defendant's input into the most important document used at sentencing and throughout an inmate's prison stay. *Wade* explicitly recognizes the important role of counsel in preserving a defendant's right to remain silent. 388 U.S. at 225. More recently, the Court has emphasized that ". . . the Sixth

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[10] It is appropriate in a case disposed of by plea, with sentencing the only proceeding of substance, to treat proceedings before sentencing as analogous to pretrial stages in a case that is tried.

Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine* v. *Moulton*, ___ U.S. ___, 106 S.Ct. 477, 88 L.Ed.2d 481, 496 (1985). The *Moulton* court noted that ". . . the right to the assistance of counsel is shaped by the need for the assistance of counsel, ..." *Id.*, at 492. It is hard to imagine a situation in which counsel could be of more benefit to a defendant than in deciding whether to claim or waive the Fifth Amendment privilege. See also *United States* v. *Ash*, 413 U.S. 300, 312 (1973) ("In *Massiah* [v. *United States*, 377 U.S. 201 (1964)], counsel could have advised his client on the benefits of the Fifth Amendment. . . .") Respondent's damaging admissions were thus elicited in violation of his Sixth Amendment right to counsel.

III. An Incarcerated Convicted Defendant Should Be Given *Miranda* Warnings Before A PSI Interview

In *Minnesota* v. *Murphy*, *supra*, this Court held that a probationer who was questioned by his probation officer during a mutually-arranged meeting in the probation officer's office, and who was free at any time to terminate the meeting without adverse consequences, was not entitled to the warnings required by *Miranda* v. *Arizona*, *supra*. 465 U.S. at 433 and n.6. However, "[a] different question would be presented if [Murphy] had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting." 465 U.S. at 429 n. 5. Respondent maintains that this is that case—an interview of an incarcerated defendant by a probation officer to obtain information for use at sentencing.

Although respondent asked the Vermont Supreme Court to hold that *Miranda* warnings were required before respondent's PSI interview, the court did not reach this issue. Respondent contends that the failure of the probation officer to give *Miranda* warnings to respondent renders inadmissible his statements in the PSI interview and that the decision of the Vermont Supreme Court should be affirmed on this ground, despite the Vermont court's lack of reliance on this theory. See, e.g., *Whitley* v. *Albers*, *supra*.

In *Mathis* v. *United States*, 391 U.S. 1 (1968), the Court considered the admissibility of statements obtained from the defendant while he was serving a state prison sentence. The statements were obtained without *Miranda* warnings and were used at the defendant's federal trial for false claims against the government. This Court reversed the holdings of the lower courts that *Miranda* warnings were not required. 391 U.S. at 3.

The government contended in *Mathis* that *Miranda* should not apply because the questions were asked ". . . as part of a routine tax investigation where no criminal proceedings might even be brought, and . . . [the defendant] had not been put in jail by the officers questioning him, but was there for an entirely separate offense." The Court found that "[t]hese differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody." *Id.*, at 4.

Since *Mathis*, a line of cases from the lower federal courts has refused to equate incarceration with *Miranda* "custody." Purporting to see in *Mathis* room for such an interpretation, these courts have required something more than the normal incidents of incarceration to make

jailhouse interrogation of inmates "custodial" under *Miranda*. While respondent finds the distinctions made in these cases dubious in light of *Mathis*, we argue that respondent was entitled to warnings even under this "something extra" test. An examination of these cases shows that the need for *Miranda* warnings was less compelling than in this case.

In perhaps the leading case on the subject, *Cervantes* v. *Walker*, 589 F.2d 424 (9th Cir. 1978), the court made much of the fact that, unlike *Mathis*, the defendant was questioned by prison guards about a matter under investigation in the prison; "[t]he questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings." *Id.*, at 428. Under this test, respondent was entitled to *Miranda* warnings when questioned by the probation officer.

Likewise, in *United States* v. *Conley*, 779 F.2d 970 (4th Cir. 1985), the court, following *Cervantes*, upheld the admission of statements made to prison guards concerning a murder in the prison. On the other hand, the *Conley* court agreed that the district court had properly suppressed statements Conley made without *Miranda* warnings to an FBI agent who came from outside the prison to investigate the homicide. *Id.*, at 974 n. 5.

Other courts and judges have recognized that reading a special requirement of "extra custody" into *Mathis* creates a distincton without a difference, see *Cervantes* v. *Walker*, *supra*, at 429 (Anderson, J., dissenting). See also *United States* v. *Cadmus*, 614 F.Supp. 367 (S.D.N.Y. 1985). Further, to require a special test for *Miranda*

"custody" in prison that turns on numerous variables would make the work of investigators and judges more difficult. "As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran* v. *Burbine*, ___ U.S. ___, 106 S.Ct. 1135, 89 L.Ed.2d 410, 423 (1986), quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 430 (1984).

It should also be stressed that the probation officer/defendant contact in this case was different in purpose as well as in circumstances from the situation in *Minnesota* v. *Murphy*, *supra*. In *Murphy*, the interview was arranged as part of ongoing supervision of a probationer who had already been granted the substantial benefit of conditional release and who obviously knew that periodic inquiry by his probation officer about his rehabilitation was to be expected. See 465 U.S. at 432. In contrast, the probation officer in this case was performing the role of interrogator in her contact with respondent; his sentence had yet to be determined and this was the only issue of consequence in respondent's case since he had waived trial by his pleas. Thus, even if there is some merit to the view that probationers enjoyed diminished constitutional rights as compared to other citizens, that principle has no application before a defendant's sentence is determined.

Since there is no evidence that *Miranda* warnings were given to respondent, the Vermont Supreme Court's decision should be affirmed.

CONCLUSION

The judgment of the Vermont Supreme Court should be affirmed.

Respectfully submitted,

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